IN THE

Supreme Court of the United States

October Term, 1943.

No. 460

C. D. ROBINSON, as administrator de bonis non of the Estates of Edward S. Ross and Mary C. Ross, deceased,

Petitioner,

vs.

LINFIELD COLLEGE, a corporation, STATE OF WASHINGTON and LEONA P. SANDERSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

C. D. Robinson, as administrator de bonis non of the Estates of Edward S. Ross and Mary C. Ross, deceased, as your petitioner, respectfully prays that a Writ of Certiorari issue to review judgment entered June 29, 1943, in the United States Circuit Court of Appeal for the Ninth Circuit, in case No. 10221 entitled "C. D. Robinson, as administrator de bonis non of the Estates of Edward S. Ross and Mary C. Ross, deceased, Appellant, vs. Linfield College, a corporation, State of Washington and Leona P. Sanderson, Appellees" (Tr. p. 137). For opinion see (T. p. 130-136). Following said decree a petition for rehearing was duly presented to

said United States Circuit Court of Appeals and a final decision was entered denying said rehearing on July 31, 1943 (Tr. p. 138).

QUESTIONS PRESENTED.

1. May the United States Circuit Court of Appeals grant a decree for the respondents (Tr. p. 130-137) on the grounds that said action is barred by the Statute of Limitations of the State of Washington and that laches applies for failure to institute timely proceedings, where the pleadings, findings of fact and conclusions establish that Mrs. F. E. R. Linfield at all times in said action was a Vice President and Director of the said Ross Holding Company, a corporation, and a trustee for said appellants.

2. May the Circuit Court of Appeals affirm a decision of the District Court in favor of the appellees in this action, which decision is founded on the ground that the cause of appellant is barred by the Statute of Limitations and laches of appellants, where there was substantial evidence that Mrs. F. E. R. Linfield, Trustee, was a permanent resident of and lived continuously in the State of Oregon throughout said period of limitations prior to her death, and where the undisputed evidence was that Linfield College was an Oregon corporation throughout all of the claimed period of limitation under the Statute of the State of Washington?

3. May the Circuit Court of Appeals affirm a decision of the District Court where said decision is in conflict with the uniformity of decisions by the several Circuit Courts of Appeal in a cause where the issues involved

are important to the orderly administration?

4. May the Circuit Court of Appeals affirm a decision of the District Court in favor of the appellees, Linfield College, in this action, which decision is founded on the ground, that the cause of the appellant is barred by the statute of limitations and laches of appellants, where there was substantial evidence that said Linfield College, appellee, received trust property from Mrs. F. E. R. Linfield, trustee of appellants, as a gift?

STATEMENT.

For purpose of brevity in this petition, we direct the Court's attention for a complete statement of the facts herein to the opinion of the said United States District Court and its findings of fact set out in (Tr. p. 65 to and including p. 108) and the opinion of above entitled United States Circuit Court of Appeals in (Tr. p. 130 to and including p. 136).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

It is respectfully submitted by your petitioners and relied upon as reasons for the granting of the writ that:

1. The decision of the Circuit Court of Appeals for the Ninth Circuit has the effect of being a departure so far from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

2. The decision of the Circuit Court of Appeals as rendered has decided an important question of local law in a way in conflict with applicable local decisions. The

decision of the Circuit Court of Appeals upholds a decision of the U. S. District Court, which is based upon the theory that the cause of action of petitioner was barred by the Statute of Limitations and by laches, and has thereby decided an important question of local law in a way in conflict with applicable local decisions.

3. That the decision of the Circuit Court of Appeals has the effect of the unlawful enrichment of the successors of a trustee after a gift of trust property.

4. The said decision of the Circuit Court of Appeals for the ninth Circuit has the effect of being a departure so far from the accepted and usual course of judicial proceedings and decisions as to do away with uniformity of decisions of said Courts and to eliminate the litigants right to have their day in court on all issues properly presented to the trial court. Further the issues involved in this petition and not considered in the decision of said Circuit Court of Appeals herein are of great importance to the public interest, as such decisions affect many and the amounts considered are large.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 10221, "C. D. Robinson, as administrator de bonis non of the Estates of Edward S. Ross

and Mary C. Ross, deceased, Appellant, vs. Linfield College, a corporation, State of Washington and Leona P. Sanderson, Appellees," and that the judgment of said Court be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

October, 1943.

O. C. MOORE,
H. M. DUNPHY,
W. C. LOSEY,
Counsel for Petitioners.

JOHN HENDERSON PELLETIER,
Of Counsel for Petitioners.

State of California,
County of Los Angeles, ss.

John H. Pelletier and O. C. Moore, members of the Bar of the Supreme Court of the United States and counsel for the petitioners herein, do hereby certify that the foregoing petition is well founded and not interposed for delay.

JOHN H. PELLETIER,
O. C. MOORE.

IN THE

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October Term, 1943.

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Petitioner,

vs.

LINFIELD COLLEGE, a corporation, STATE OF WASHINGTON and LEONA P. SANDERSON,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below

The Findings of Fact and Conclusions of Law and opinion of the District Court of the United States for the Eastern District of Washington, Northern Division, are to be found in Transcript of Record of said Court to the United States Circuit Court of Appeals, for the Ninth Circuit, on pages, beginning top of page 55 to page 93, and Findings of Fact of same (Tr. p. 93 to 108).

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit found in Tr. p. 130 to

136 was filed June 29, 1943 (Tr. p. 137) and order denying petition for rehearing was filed July 31, 1943 (Tr. p. 138).

JURISDICTION.

The Judgment of the Circuit Court of Appeals was filed on June 29, 1943, and on July 31st, 1943 a Petition for Rehearing duly and legally filed, was denied. This Petition for Writ of Certiorari is filed within three months after the filing of the decision of the said United States Circuit Court of Appeals, for the Ninth Circuit on the Petition for Rehearing.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 28 U. S. C. A. 347-350.

STATEMENT OF THE CASE.

The essential facts of the case herein are stated in the accompanying petition for Writ of Certiorari and in the interests of brevity are not repeated herein. We will briefly present the law cited and references to facts relied on in transcript.

SPECIFICATION OF ERRORS.

I

That the said Circuit Court of Appeals erred in rendering and entering a final judgment (Tr. p. 137) through failure to give consideration to the proved and conceded trust relation existing between said appellants and appellee.

The property in issue is a trust asset of the, at all times insolvent family corporation, and was deeded without valuable or sufficient consideration, in its name, ultra vires the corporation by two directors thereof to

the sole remaining director F. E. R. Linfield, who subsequently converted and transferred said property as a gift to said appellee college, without any consideration whatever moving to the Ross Holding Corporation, its stockholders and creditors.

II

The said Circuit Court of Appeals erred, in view of the entire record and the issues of law and of fact thereby and by the pleadings presented, in not making, rendering and entering judgment for appellants, in manner and form prayed by the complaint.

ARGUMENT AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Facts Which Establish F. E. R. Linfield Vice President and Trustee.

From January 2, 1915 to March 26, 1940, Frances Eleanor Ross Linfield (hereinafter called F. E. R. Linfield) was trustee for appellants and petitioners herein and said petitioners were cestui qui trustients.

Such fact is conceded and admitted by respondents herein by the following citations:

> See Tr. p. 7, 2nd line from top of page in Paragraph 10 to end of paragraph.

Contents of said paragraph of plaintiffs complaint is admitted by respondents' answer as follows:

> See page 31 of said transcript, paragraph 5 of respondent's answer.

Said appellant Ross Holding Co. was insolvent during all the times herein mentioned, while said F. E. R. Linfield was trustee for appellant.

See Court's Findings of Fact, page 104 of transcript, beginning with last line on said page.

F. E. R. Linfield became officially Vice President and Trustee for Ross Holding Co. January 2, 1915.

See Tr. p. 96, paragraph 7 of said Findings of Fact.

Ross Holding Co. was a Ross Family Holding Corporation.

See Tr. p. 94, Paragraph 2, Findings of Fact.

Mrs. F. E. R. Linfield's relation with the Ross family was an unusually influential one.

See Tr. p. 96, Finding of Fact, beginning with Paragraph 6, to 10th line of said paragraph.

F. E. R. Linfield, Vice President and Trustee of Ross Holding Co. secured deed of property in controversy herein from her fellow officers of said insolvent corporation. **October 4, 1916.**

See Tr. p. 99, Court's Finds of Fact, starting with 14th line from top of said page to line 18.

ARGUMENT.

CORPORATE OFFICERS OR DIRECTORS ARE FIDUCIARIES AND TRUSTEES.

From the foregoing facts which are admitted and conceded by both the Petitioners as well as the respondents . . . that F. E. R. Linfield was a Vice President and Director of Ross Holding Company . . . the next decisive question to determine is, was she a fiduciary and a trustee.

Cited in Wilgus (former professor of Corporation law at University of Michigan Law School). Vol. 2, Private Corporations, page 1730, quoting

from Mr. Justice Shope in the case of Ellis v. Ward, 137 Ill. Rep. 509-533:

"It is a principle of general application, and recognized by this court, that the assets of a corporation are, in equity, a TRUST FUND. (St. Louis and Sandoval Coal Mining Co., 116 Ill. 170), and that the DIRECTORS of a corporation are trustees, and have no power or right to use or appropriate the funds of the corporation, their CESTUI QUE TRUST, to themselves, or to waste, destroy, give away or misapply them. Holder v. LaFayette, Bloomington and Mississippi R. Co., 71 Ill. 106; Cheeney v. LaFayette, Bloomington and Mississippi R. Co., 68 Ill. 570; I Morawetz on Private Corporations, Sec. 516-517. And it is equally WELL SETTLED that no lapse of time is a bar to a direct or express trust, as between the trustee and cestui que trust. Chicago and Eastern Illinois R. Co. v. Hay, 110 Ill. 493; Wood on Limitation of Actions Sec. 200, and cases cited in note. If the trust assumed by the directors of a corporation in respect of the corporate property under their control is to be regarded as a direct trust, as contradistinguished from simply an implied trust, then it is apparent, under the rule announced, the statute presents no bar to this proceeding by the receiver of the corporation. Ordinarily an express trust is created by a deed or will; but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exists and to which the legal principles are applicable—and such appears to be the relation established by law between directors and corporation. 2 Pomeroy's Equity Section 6—1088-1090, 1094. The statute of limitations therefore presents no bar to recovery by the receiver."

Bogart, Section 495, page 1594. Most American Courts follow the holding of this paragraph.

"If, by reason of kinship, business association . . . physical or mental condition, or other reason, the grantee is in especially intimate position with regard to the grantor and the latter reposes a high degree of trust and confidence in the former, the court may find that the relationship is technically "confidential." The mere existence of such a connection prohibits the one trusted from seeking any selfish benefit during the course of the relationship, and gives ground for fastening a constructive trust upon the property in the hand of the grantee, irrespective of his oral promise to use it for the benefit of another . . ."

"The betrayal of such a confidence is constructively fraudulent, and gives rise to constructive trust. This is independent of any element of actual fraud. . . . The law from consideration of Public Policy presumes such transactions to have been induced by undue influence."

Benson v. Brison, 17 P. 689, 75 Cal. 525.

"Courts will indulge in the presumption that all transactions between parties occupying confidential relations to each other by which one obtains an undue advantage of the other are fraudulent."

Housewright v. Steinke, 158 N. E. 138-141, 326 Ill. 398.

"IT WAS A CASE OF CONFIDENCE INDUCED NOT BY THE BARE PROMISE OF ANOTHER, BUT BY THE PROMISE AND CONFIDENTIAL RELATION CONJOINED. IT IS NOT THE PROMISE ONLY, NOR THE BREACH ONLY, BUT UNJUST ENRICHMENT UNDER COVER OF THE RELATIONSHIP OF CONFIDENCE which puts the court in motion."

Cited in Sinclair v. Purdy by Judge Cardoza, 139 N. E. 255.

Ryan v. Plath, (Wash.) 160 Pac. 968.

On the theory of unjust enrichment, therefore, the constructive trustee may be compelled to convey or assign the corpus of the trust property and to account for and pay over the rents, etc.

4 Pomeroy's Equity Jur. 5th Edition 95.

> Bogart, page 1496 . . . "The rule is now settled by repeated judgment of this court that the statute does not obstruct the recognition of a constructive trust effecting an interest in land where confidenial relation would be abused if there were REPUDIATION WITHOUT REDRESS, of a trust orally declared. . . . Criticism of the rule is heard from time to time. . . . Whatever force the criticism may have had WHILE THE RULE WAS IN THE MAKING has vanished with the years. By long acquiescence the exception, if such it be, has wrought itself by construction into the body of the statute as if written there from the beginning."

That, as a director and vice president of the Holding Company, Mrs. Linfield was a fiduciary and a trustee of its assets for the use and benefit of the corporation and its stockholders and creditors, is the universal rule. Thus from the early Washington case of Parsons vs. Tacoma Smelting & Refining Co., 25 Wash., 492, 497, 65 Pac., 765, 767, Col. 2

> "Each (director) occupies a fiduciary relation to the corporation and to each stockholder. He must faithfully perform his trust. The ordinary obligation attending trust relations attaches to the trustee of a corporation. The policy of the law forbids a trustee to assume a double function where there are adverse interests considered. * * * the utmost good faith is required in the exercise of the

powers conferred on trustees."

Likewise from the recent case of Pepper vs. Litton 308 U. S., 295, 306, 60 S. Ct., 238, 84 L. ed., 281, 289,

> "A director is a fiduciary. Twin-Lick Oil Co. vs. Marbury, 91 U. S., 587, 588, 23 L. ed. 329, 330. So is a dominant or controlling stockholder or group of stockholders. Southern P. Co. vs. Bogert, 250 U. S., 483, 492, 63 L. ed., 1099, 1107, 39 S. Ct. 533. Their powers are powers in trust. * * * Their dealings with the corporation are subjected to rigorous scrutiny, * * * the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. Geddes vs. Anaconda Copper Min. Co., 254 U. S. 590, 599, 65 L. ed. 425, 432, 41 S. Ct. 209. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain."

So from Jackson vs. Ludeling, 21 Wall 616, 124, 33 S. Ct., 1011, 22 L. ed. 492, 495,

> "As officers of the company they (the directors) had the custody and charge of the railroad and all the property of the corporation. And they held it in a very legitimate sense as trustees. Certainly they were the trustees of the stockholders, and also, to a considerable degree, of the bondholders, owners of the mortgage."

No stronger statement can be found than the observation in Twin-Lick Oil Co. vs. Marbury, 91 U. S., 588, 590, 23 L. ed. 329, 330, that if a director becomes on his own account a party to a contract with the company his obligation for.

> "Candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent."

Also must it be borne in mind that, as said in Buffum vs. Barceloux Co., 289 U. S., 227, 237, 77 L. ed., 1140, 1146, citing authority,

> "The standard of duty is no different whether the trust to be enforced is actual or constructive. * * * The implication of a trust is the implication of every duty proper to a trust. * * * Whoever is a fiduciary or in conscience chargeable as a fiduciary is expected to live up to them."

Also,

> Geddes vs. Anaconda Mining Co., 254 U. S., 590, 597, 65 L. ed., 425, 432.
>
> Restatement, Law of Restitution, Sec. 190 (a), p. 780.

ASSERTION OF ADVERSE TITLE BY FIDUCIARY PROHIBITED.

It is of utmost importance that while all contracts between trustees and beneficiaries are to be viewed with suspicion and that for their validity the burden of proof rests on the trustee, the rule goes further and absolutely prohibits the purchase or assertion by a trustee on his own account of adverse title to a trust asset. Strong emphasis is placed on this distinction. Nor will he, on any account, be heard to assert a beneficial, adverse title or interest, by purchase or barter, in a trust asset which he took, in the first instance, and was obligated to hold for the benefit of another. This distinction is sharply defined and may not be disregarded in any instance.

Thus from 1 Perry on Trusts and Trustees (7th ed.), Sec. 195, p. 328,

> "No trustee can directly or indirectly become a purchaser in his own behalf of the trust property, and hold it against the cestui. * * * Irrespective of the fairness of the price and the absence of oppression, equity will grant a cestui appropriate relief.'

From the leading federal case, of Michoud vs. Girod, 4 How. 503, S. Ct., 11 L. ed. 1076, 1099, the following,

> "The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another that which he sells on his own account. * * * no rule is better settled, than that a trustee cannot become the purchaser of the trustee estate. He cannot be, at the same time, vendor and vendee."

As said by the Supreme Court of California in Davis vs. Rock Creek L. F. & M. Co., 55 Cal., 359 at p. 364, 36 Am. Rep., 40, with quoted approval in the recent case of In Re Boggs' Estate., 121 Pac. (2d) 678, at p. 683, Vol. 2,

> "The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. * * * Courts will not permit any investigation into the fairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary."

Also with approval in Pacific Vinegar & Pickle

Works vs. Smith, 78 P. 550, 104 Am. St. Rep. 42.

Bearing in mind the dominant influence exercised by Mrs. Linfield over the other directors by whom the deed to her was executed, the following additional from Pepper vs. Litton, supra, is directly in point.

> "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of a narm's length bargain. If it does not, equity will set it aside."

Applying the above doctrine this Court, in the comparatively recent case of Brunn vs. Hanson, 103 Fed. (2d), 685, at p. 699, quoted with approval from 3 Bogert, Trusts and Trustees, Sec. 484, the following,

> "The fairness or good faith of the sale by the trustee to himself is immaterial. He may have paid the full value of the property, and been guilty of no concealment, misrepresentation, or other underhanded dealing. The cestui's option to avoid or use the constructive trust remains. Equity will not inquire into the fairness of particular sales. It realizes that, if it did, in many cases the unfairness would be so hidden as to be undiscoverable. The trustee might have had secret information of such values which the cestui cannot prove he had It is deemed better to give the beneficiary the opportunity to strike down all such sales, including some which are made in entire good faith, rather than to attempt the very difficult task of separating out those which are advantageous to the cestui and fairly conducted."

The following from Hoyt vs. Latham, 143 U. S., 553, 566, 36 L. ed., 259, 26 p. 264, reviewing the earlier Supreme Court cases, leaves no doubt as to the permanence of Michoud vs. Girod as an authority in our federal courts.

Also, as to duty due to stockholders see 2 Thompson on Corporations, Third Ed., Sec. 1323, p. 787, and with reference to creditors see Sec. 1324, p. 789, same volume.

Though rejecting below appellant's contention that a corporate director is a fiduciary and a trustee (Opinion, 42 F. S. a p. 155, Tr., pages 84, 85, 86, 87), in the more recent case of Guaranty Co. vs. United States (44 F. S. 417, at p. 420), the opinion appears to indicate that Judge Schwellenbach of the United States District Court has experienced a change of view.

LINFIELD COLLEGE, RESPONDENT, NOT AN INNOCENT PURCHASER, TOOK SUBJECT TO THE TRUST.

Innocent purchaser is an affirmative defense.

Boone vs. Chiles, 10 Pet., 177, 211, 212, 9 L. ed. 388, 400, 401.

Wright-Blodgett Company vs. U. S., 236 U. S., 397, 404, 59 L. ed., 637, 640.

Oliver vs. Piatt, 3 How. 333, 11 L. ed. 622, 652.

Rules of Civil Proceedure, rule 8 (c).

The defense was not so pleaded and was not properly before the Court, and, though shadow boxing with a nonexistent pleading be out of order, it is believed well, in view of vague references in the findings below, to point out the nature of the defense of innocent purchases, how pleaded and to whom available, in order that its inapplicability in this case, had it been set up, may be immediately apparent.

The form and indispensable requirements are stated

in Boone vs. Chiles, supra, with quoted approval by Chief Justice Hughes in Wright-Blodgett vs. U. S., supra, 59 L. ed. at page 640,

But a glance at the requirements, narrated by Chief Justice Hughes, is necessary to convince that Mrs. Linfield or Linfield College did not plead but was never in a position to plead innocent purchaser as a defense.

STATUTE OF LIMITATION OR LACHES, TRUSTEE, AN EXCEPTION.

The relationship of trustee on the part of the respondents being established and the petitioners being the cestui qui trustient, we maintain under the laws of Washington that such a relationship establishes an exception to the Statute of Limitations. Authority for this is found in the case of Hotchkin, Administrator, Appellant v. McNaught-Collins Improvement Company, Respondents, 102 Wash. 161, which reads as follows:

> "In the above authority an EXCEPTION IS STATED where THE RELATIONSHIP BETWEE THE PARTIES IS THAT OF TRUSTEE and CESTUI QUI TRUST. The statute of limitations will not necessarily apply although the remedies at law and in equity are concurrent. 25 Cyc. 1056-58. The exception is on the principal that in the case of a technical or in other words, direct or express continuing trust, such as is exclusively within the jurisdiction, THE GENERAL RULE IS that the statute of limitations does not run between TRUSTEE and CESTUI UI TRUST, as long as the trust subsists FOR THE POSSESSION OF THE TRUSTEE IS THE POSSESSION OF THE CESTUI QUI TRUST and the TRUSTEE HOLDS AC-

CORD TO HIS TITLE."

> "In order to set the statute in motion in favor of the trustee the trustee must TERMINATE IT, as by its own limitations or by SETTLEMENT OF THE PARTIES, or there must be a REPUDIATION OF THE TRUST by the TRUSTEE and an assertion of an adverse claim by him and the FACT MADE KNOWN TO THE CESTUI QUI TRUST. 25 Cyc. 1150."

If the respondents Linfield College desired to show that the statute of limitations applied in this case, the burden of proof is on them to clearly and conclusively prove that the trusteeship was closed, settled or ended by said trustees, by giving ACTUAL NOTICE of cancelling the trusteeship.

Respondents claim Mrs. F. E. R. Linfield made a purchase of the property in this action on October 4, 1916 and as purchaser of said lot for a consideration later transferred same as a gift to said Linfield College. In order to have a cancellation of trusteeship, respondents must at least establish that a trusteeship existed before a notice of cancellation of such trusteeship could be possible.

The petitioners have established the relationship of trustee and cestui qui trust existed between the petitioners and respondents. The relationship being firmly established, the burden of proof was on the respondents to show that notice of actual repudiation took place to petitioners and that said property was held hostile to said petitioners.

Hotchkin v. McNaught-Collins Imp. Co., 102 Wash. 161.

The following authority indicates to what extent of notice is necessary to constitute a repudiation of a trust by a trustee.

NOTICE OF REPUDIATION BY TRUSTEE TO CESTUI QUI TRUST.

The filling of deed from the trustee, Mrs. F. E. R. Linfield, to the College did not constitute constructive notice to petitioners since petitioners herein were not subsequent purchasers or encumbrances.

> "The recording of an instrument pursuant to a recording statute such as Rem. Rev. Stat. Sec. 10596-2 is constructive notice to those persons only who acquire interests subsequent to the execution of the instrument, or who in dealing with property are compelled to search the public records in order to protect their own interests: it does not affect the rights of prior parties.
>
> Ryan v. Plath. 140 Pac. 2nd (Wash.) 968 and cases cited.

See Six Companies of Calif. vs. Joint Highway Dist. 311 U. S. 180 (85 L. ed. 114), which holds U. S. Courts follow State Court decisions in non-Federal Law.

> See In re Marshall Estate, Col. 1, Sec. 3, page 27, Vol. 22, Atl. Rep. 24.
>
> Perry Trust, Sec. 864.
>
> Fox v. Cash, 11 Pa. St. 207.

Cited in this case is Lord Justice Knight Bruce v. Godfrey, 5 De Gex M. & G. 86.

> "The relation of cestui qui trustient to his trustee being ONE OF CONFIDENCE, that his estate will be preserved to him, THE BURDEN is

> CLEARLY ON THE TRUSTEE to give such notice as will enable him to protect his interests from any adverse or inconsistent claim on the part of the trustee. CONSTRUCTIVE NOTICE CANNOT BE SUFFICIENT, because owing to the confidential relations of the parties, the cestui qui trust, cannot be supposed to be on his guard. IN THE NATURE OF THE CASE ACTUAL NOTICE MUST BE ESSENTIAL."

Thus the conclusion of the Circuit Court of Appeals in its judgment, that the statute of limitations of the State of Washington, had run against said petitioners is erroneous, as the admitted facts and law governing same establishes that F. E. R. Linfield and said Linfield College, respondents, are trustees for said petitioners. No statute of limitations have run against said petitioners nor was same possible to run because of the laws and decision of the State of Washington, as well as the decision of the United States Supreme Court. In this action the respondents did not endeavor to show, nor does the record show, that repudiation by them of their trusteeship to petitioners had taken place or had been attempted. Thus, no act on their part took place to start the Statute of Limitations or Laches running.

A THIRD PERSON WHO TAKES PROPERTY AS A GIFT; BECOMES TRUSTEE FOR CESTUI QUI TRUST.

We call the court's attention to the following references in transcript to show how the property in controversy was secured by said respondent Linfield College.

See Tr. p. 73, beg. 4th line to 12th line from top of page.

"At some time prior to January 10, 1922, Mrs Linfield and the college president decided that the transaction should be made public and on that date the president so announced to the Board of Trustees and the students. The total value of the GIFT was estimated to be somewhere between $200,000 to $300,000. Thereafter on Feb. 11, 1922 Mrs. Linfield deeded the four pieces of property to defendant."

See first two lines of second paragraph, p. 73.

"The announcement of this GIFT received considerable publicity through the press."

(Tr. p. 132, last paragraph, first 4 lines.)

Judge Gerrecht's opinion reads as follows:

"In April, 1918 Mrs. Linfield proposed to make a GIFT to the college of four pieces of property she owned in Spokane including the property in issue subject to the incumbrances thereon on condition that she enjoy the income therefrom."

Vol. 2 Scott on Trusts, Sec. 289, page 1598 states:

"It is of course, well settled law that where a trustee in breach of trust transfers trust property to a person who pays no value for the property . . . the transferee takes subject to the trust, even though he had no notice of the breach of trust of the existence of the trust."

"Mr. Justice Holmes in Otis v. Otis says 'A person into whose hands . . . a trust fund comes by conveyance from original trustee is chargeable as trustee in his turn, if he takes it without consideration, whether he has notice of the trust or not. This has been settled for 300 years since the time of uses."

Vol. 2, Scott, page 1599:

Proff. Langdell says, "If he paid nothing for the property (e. g. if he received it as a gift) the law

will imply notice against him, as this establishes privity . . . but better reasoning is . . . a gratuitous transferee of trust property takes subject to the trust, not because he has notice of the trust, but because unjustly enriched at the expense of the beneficiaries of the trust if he were permitted to profit through THE BREACH OF THE TRUST . . . the truth clearly is that the innocent donee takes subject to the trust, because he otherwise would be unjustly enriched at the expense of the beneficiaries as a result of the violation by the trustee of his duty to them."

TRUSTEE ESTOPPED FROM SETTING UP A CLAIM AGAINST TRUST ESTATE

198 Washington 142, page 147 . . . Trustee accepting a tract is estopped from setting up a claim to trust estate, page 147 (3). "There is no consideration given for deed made in violation of the deed of trust . . . conveyance is void.

Trustee owes to cestui qui the highest good faith, diligence and integrity.

Undivided loyalty to the trust is required of trustee. The trustee not allowed to make a profit out of the trust.

STATUTES OF LIMITATIONS INAPPLICABLE.

Since the recent opinion, affirming the court below, closes with the statement that (Tr. p. 136, last paragraph),

> " * * * in view of the fact that this action is barred for failure to institute timely proceedings we refrain from a discussion of the merits."

(1) limitations, Sect's 156 and 788, Rem. Rev. Stat's of Wash.; (2) delay on the part of the beneficiaries in instituting that action.

Quoting near the close of this court's opinion as controlling here, the following from Russell vs. Todd, 209 U. S. 280, 84 L. ed. 754, at page 760, Col. 2, viz.,

> " * * * when the question is of lapse of time barring relief in equity," federal courts will, "when consonant with equitable principles, adopt and apply as their own, the local statute of limitations applicable to the equitable causes of action in the judicial district in which the case is heard,"
> this court announced.
>
> "There is no doubt but what these statutes of limitations (sect's 156 and 788) had closed the plaintiff's case at law."

In reaching the above conclusion the recent opinion omits notice of the almost immediately following further statement in Russell vs. Todd, directly assimilating the rule to the instant case.

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling."

While we propose with much deference, to show further on that plaintiff's case has not been foreclosed by Sections 156 and 788, or any other statute, we make no question on the quoted excerpts from Russell vs. Todd, other than that they do not fully state the rule, which is that the construction placed on a state statute by the highest state court becomes and must be considered to be a part of the statute as fully, for all purposes, as if written therein by the legislative body.

As said in

Georgia R. & Electric Co. vs. Decatur, 295 U. S. 165, 170, 79 L. ed. 1365, 1369, Col. 2,

"The (state court's) construction becomes a part of the statute as much as though it were found in appropriate words in its text."

Also,

Supreme Lodge, Knights of Pythias vs. Meyer, 265 U. S. 30, 32, 68 L. ed. 885, 887,

Hartford Acci. & Indem. Co. vs. Nelson Mfg. Co., 291 U. S. 352, 358, 78 L. ed. 840, 845, Col. 1,

Erie Railroad Co. vs. Tompkins, 394 U. S. 64, 82 L. ed. 1188.

Such is the distinct holding, as presently shown, of the Supreme Court of Washington in Ilse vs. Aetna Indemnity Co., 69 Wash. 484, 487, 125 Pac. 780, 781 and Eagles vs. General Electric Co., 5 Wash. (2d) 20, 33, 104 Pac. (2d) Wash. 968.

Ryan vs. Plath, 140 Pac. (2d) Wash. 968.

In line with the above, attention is next invited to 2 Rem. Rev. Stat., Sec. 168, reading,

> "If the cause of action shall accrue against any person who is a nonresident of this state, or who is a resident of this state, and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limit for the commencement of such action."

Since by the plain wording of Sec. 168, and as held by the Washington Supreme Court in

Ilse vs. Aetna Indemnity Co., 69 Wash. 484, 487, 125 Pac. 780, 781, and

Eagles vs. General Electric Co., 5 Wash. (2d) 20, 33, 104 Pac. (2d) 912, 917,

section 168 is not available to nonresidents of Washington, we beg now to remind that Linfield College is an Oregon corporation, hence a resident of that state and a nonresident of Washington.

Suburban Transp. System vs. King County, 160 Wash. 364, 366,

Ex parte Schollenberger, 96 U. S. 369, 377, 24 L. ed. 853,

14c C. J. 1224, Sec. 3933,

Thompson on Corporations (3d), Sect's 565, 569.

Also, within the meaning of limitation statutes corporations are deemed to be out of states other than those by the laws of which they are organized, hence incapable of pleading limitations.

17 R. C. L., p. 955, Sec. 321,

Williams vs. Metropolitan St. R. Co. (Kan.), 74 Pac. 600,

Travelers Ins. Co. vs. Fricke (Wis.), 74 N. W. 372,

Hanchett vs. Blair (9th Cir.), 100 Fed. 817, 826, 827.

In the light of the foregoing, attention is now called to the fact that in the year 1918 Mrs. Linfield established her permanent residence in the State of Oregon.

Such is the uncontroverted allegation of paragraph XI of the complaint (Tr. 7), and the district court found, Finding VII (Tr. 97),

> "Mrs. Linfield had lived in Spokane for many years, but in the year 1918 she established her permanent residence in the State of Oregon and for a number of years lived in the City of McMinnville and later in Portland, Oregon, until her death."

The fact of nonresidence and the wrongful transfer of trust property being established, the above quoted provisions of Section 168, Rem. Rev. Stat. of Washington, are brought directly into play and renders squarely in point the following, already quoted language from Russell vs. Todd, 309 U. S. 280, 289, 84 L. ed. 754, 761, Col. 1, viz.,

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling."

That the circumstances disclosed by the record, there being no applicable state statute of limitations, bring this controversy directly within the plain meaning of the language just quoted from Russell vs. Todd, is confidently urged.

II.

DOCTRINE OF LACHES NOT APPLICABLE.

Reminding once again that the property in issue was wrongfully transferred to Linfield College by Mrs Linfield without consideration, and that in consequence the

college is not in the attitude of an innocent purchaser but holds legal title subject to the trust under which it was held by Mrs. Linfield, attention is now called to the universal rule that neither limitations nor laches is available to other than a good faith purchaser for value against an action for the impressment of a trust on property wrongfully conveyed by a trustee in disregard of fiduciary obligations.

The doctrine, old as equity itself, is thus stated by Chief Justice Stone in United States vs. Dunn, 268 U. S. 121, 132, 69 L. ed. 876, at page 882, Col. 1,

> "The legal principles governing the right to follow trust funds diverted in breach of the trust were succinctly and accurately stated by Turner L. J. in Pennell vs. Deffell, 4 De G. M. & G., 372, 388, 43 Eng. Reprint, 551, as follows: 'It is * * * an undoubted principle of this court that, as between cestui que trust and trustee and all parties claiming under the trust, OTHERWISE THAN BY PURCHASE FOR VALUABLE CONSIDERATION WITHOUT NOTICE, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property whether in its original or in its altered state, continues to be subject to or affected by the trust'." (Emphasis substituted.)

The above excerpt was quoted with approval by the Supreme Court of Washington in Woods vs. Metropolitan Nat. Bank, 126 Wash. at page 352, 218 Pac. 266, and has been universally accepted by all courts. Goodwin vs. American Surety Co., 190 Wash., at pp. 478 and 479, 68 Pac. 619, is to the same effect, viz.,

> "Where a trustee, such as an administrator, guardian or other representative of a person under legal

> disability, has been guilty of converting the estate of his cestui que trust, neither the trustee nor one who has received the estate from him with knowledge of the facts may plead the bar of the statute. * * * This is upon the principle that the title of the cestui que trust has not been affected by the transfer. * * * If the exception to the general rule were not effectual, then a trustee, by his failure to bring suit to set aside his own wrongful act, participated in by a third party, could wreck an estate and prevent a minor, or one suffering under some legal disability from ever recovering, no matter how strong the justification. This would not be equity and, we think, should not be the law."

The question was again examined, with the same result, in Eagles vs. General Electric Co., 5 Wash. (2d), 20, 28, 104 Pac. (2d) 912, 917.

Also, Paysse vs. Paysse, 86 Wash 349, 354, 150 Pac. 622.

Hence, by necessary implication, the Supreme Court of Washington is on record to the effect that neither Sections 156 nor 788, nor any other statute, applies to defeat rightful claimants to trust property converted or wrongfully transferred by a trustee, except it be in the hands of an innocent purchaser for value, without notice. This is the doctrine expressly recognized and applied by the United States Supreme Court, speaking through Chief Justice Stone, in the above quoted case of United States vs. Dunn, supra.

Other questions excusatory of laches, including the dissolution of the Ross Holding Company on July 1, 1923, whereby all pending proceedings were abated so that from and after that date there remained no person

or corporation authorized to sue either at law or in equity, thereby necessitating an indirect approach by means of a stockholders suit, so that the encroachment of time was tolled as of that date, are not mentioned in the opinion though discussed on brief.

> Hawley vs. Bonanza Queen Mining Co., 61 Wash., 90, 92, 111 Pac. 1073, 1074.
>
> Oklahoma Natural Gas Co. vs. Oklahoma, 273 U S. 257, 259, 71 L. ed. 634 635.

It follows, therefore, on the foregoing conceded facts that neither limitations nor laches has intervened to bar relief, since this action was brought within twenty years after the conversion.

U. S. SUPREME COURT FOLLOW STATE COURT DECISIONS ON NON-FEDERAL LAW.

Six Companies of California vs. Joint Highway Dist. No. 13; 311 U. S. 180 (85 L. ed. 114) holds that Federal Courts are bound to follow the State Court decisions on non-Federal Law. The petitioners call the court's attention to the quotation of the above entitled court, in Russell v. Todd, 309 U. S. 280, top of page five of said opinion, which reads as follows:

> 'In Federal Courts of Equity the doctrine of laches was early supplemented by the rule that when the question is of lapse of time barring relief in equity, such courts, even though not regarding themselves as bound by State statutes of limitations, will nevertheless, when consonant with equitable principles, adopt AND APPLY AS THEIR OWN, the local statutes of limitations applicable to the equitable causes of action in the judicial district

IN WHICH THE CASE IS HEARD."

We appreciate the conditions under which certiorari may be granted by this Honorable Court. In this particular case, there has been so drastic a departure from usual accepted processes of judicial administration and decision as to warrant the intervention and supervision of this Court. Under the heading of "Reasons relied upon for the allowance of the writ of certiorari" in our Petition for writ, we by this reference urge again all said reasons.

It would appear from the foregoing law and facts that said Circuit Court of Appeals ignored the holding in Parson's v. Tacoma Smelting & Refining Co., 25 Wash. 492-497; that a corporate director is a trustee and fiduciary in the full sense of those terms, which holding is strongly affirmed by the U. S. Supreme Court in Pepper v. Litton, 309 U. S. 306 (84 L. ed 281-289). The omission of said Circuit Court to follow and apply the State law as decided in the Parson's case strongly reinforced by said Pepper v. Litton case, brings petitioner's case within the meaning and provisions of the Supreme Court Rule 38 (5b) to the effect that the Supreme Court may grant certiorari in case where Circuit Courts of Appeals,

> "has decided an important question of local law in a way probably in conflict with applicable local decisions . . . or has decided a Federal question in a way probably in conflict with applicable decisions of this (U. S. Supreme) Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of the Courts power of supervision."

We further emphasize the proposition involved in the Erie Railway vs. Thompkins, 394 U. S. 64 exists in petitioner's case,—constitutes or may constitute a conflict between State and Federal Law—thus a Federal question.

Diversity of Citizenship exists in petitioner's case. Under Erie v. Thompkins and subsequent cases, Federal courts, where diversity of citizenship cases arise are bound to accept and apply the State Law as declared by State statutes and court decisions—and this rule applies to the Statute of Limitations.

Stoner v. New York Life, 311 U. S. 464.

CONCLUSION.

The questions which this application suggests should be definitely settled by this Court. The questions are present in large number of cases and involve considerable moneys.

We respectfully pray that this Honorable Court take jurisdiction in the premises.

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(9)

IN THE

Supreme Court

of the United States

October Term, 1943

No 460

C. D. ROBINSON, as administrator de bonis non of the Estates of Edward S. Ross and Mary C. Ross, deceased,

Petitioner,

vs.

LINFIELD COLLEGE, a corporation, STATE OF WASHINGTON and LEONA P. SANDERSON,

Respondents.

BRIEF OF RESPONDENT LINFIELD COLLEGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT LINFIELD COLLEGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Our main purpose, in this brief, is to direct attention to some facts which affect certain statutes of the State of Washington, referred to by petitioner as limitation statutes, and which he claims were tolled due to the alleged non-residence of Frances E. R. Linfield, deceased, and Linfield College (Petitioner's brief 25, 26, 27). A few other considerations will be noticed very briefly.

There were two so called statutes of limitation relied upon by respondents, Sec. 156 and Sec. 788, Rem. Rev. Stat. of Wash.

Section 156 is as follows:

> "1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestors, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action."

Section 788 is as follows:

> "Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid shall be entitled to the benefit of this section."

These are the statutes referred to in the opinion of the Circuit Court of Appeals. Section 156 is found in Chapter 3, Title 2, Rem. Rev. Stat., which is entitled "Limitation of Actions". Section 788 is found in Chapter 1, Title 6, Rem. Rev. Stat., which is entitled "Actions for Possession of and Acquiring Title to Real

Property". Section 168, Rem. Rev. Stat., quoted by Petitioner at page 25 of his brief, and which purports to toll the time for the commencement of actions, is a part of the limitation statute, while Section 788 is not strictly a limitation statute, but is one enacted for the purpose of setting titles at rest and was passed in 1893, being a part of Chapter XI of the 1893 Laws of Washington, and entitled "Quieting Titles and Confirming Titles to Land."

If we should assume that, insofar as Section 156 is involved, the commencement of the action might be tolled under the provisions of Section 168, nevertheless said last mentioned section would not in any manner affect the bar by lapse of time under the seven year statute, Section 788. This is recognized in the decisions cited by petitioner at page 25 of his brief (Ilse vs. Aetna Indemnity Co., 69 Wash. 484, 125 Pac. 780, and Eagles vs. General Electric Co., 5 Wash. (2d) 20, 33, 104 Pac. (2d) 968.) This is very carefully explained in the Eagles case at pages 33, 34 and 35.

So far as we are aware, the Supreme Court of Washington has never held, that, even where there is involved the ten year statute, Sec. 156, that absence from the State tolls the operation of such statute, in an *in rem* action. It is not so decided in either the Ilse or the Eagles cases.

This action is one *in rem*, and jurisdiction may be acquired under the Washington statute, in such actions, by publication of summons. Sec. 228 Rem. Rev. Stat.

Under such situation non-residence was of no importance. 34 Am. Jur. 179, Sec. 223. Furthermore, the corporation statute of Washington required foreign corporations, doing business in that state, to appoint a resident agent for the purpose of service of process. Rem. Rev. Stat. of Wash., Sec. 3854. Presumably the law was obeyed. 20 Am. Jur. 221, Sec. 226. There has been no claim it was not.

The tolling statute, Sec. 168, could not by any stretch of the imagination affect the doctrine of laches.

There are many inaccurate statements in petitioner's brief, but only two will be noticed. At page 8 it is stated that Frances E. R. Linfield was a trustee for petitioner from January 2, 1915, to March 26, 1940. On the same page it is then stated that such fact was admitted by appellant. There is no such fact and no such admission and there is no finding there was any trust relationship. A trust relationship on the part of Mrs. Linfield was denied. It was found, however, that Mrs. Linfield served as a director of Ross Holding Company from January 2, 1915 to January 15, 1918. (R. 96)

The main facts, stated chronologically, and which are shown by the findings made by the District Judge, are as follows: (1) The deed, which is questioned, was executed October 4, 1916, and recorded 25 years before this action was commenced. (2) That deed was executed by the ones who were financially interested in the grantor, Ross Holding Company. Mrs. Linfield had no interest. (3) Mrs. Linfield paid a consideration in ex-

cess of the value of the property, and the income from the property was about $2000 less annually than the carrying charges. (4) No part of the consideration has ever been returned or tendered. (5) There was no secrecy in the transaction. (6) The corporation had authority to deed, and no law was violated. (7) The deed was not *ultra vires* the corporation. (8) There was no fraud or overreaching. (9) The directors who executed the deed consulted with the corporation's attorneys about the year 1918 on the question of attempting to set the deed aside. (10) A receiver was appointed over Ross Holding Company in January, 1918, and it does not appear such receiver has ever been discharged. (11) In the spring of 1918, Mrs. Linfield wrote a letter to the receiver, stating that she understood the deed was being questioned, and offered to reconvey the property if she was made whole for her outlay. (12) The receiver investigated the transaction and refused the tender, because it concluded there was no value in excess of what Mrs. Linfield had paid. (13) The deed to Linfield College was executed, delivered, and recorded in the spring of 1922, more than 18 years before this action was commenced. (14) All persons in interest, from that time, had actual notice of all material facts. (15) Linfield College acquired title in good faith, without notice and for a valuable consideration. (16) Lee Hammond, through whom respondent, Leona P. Sanderson acquired title, acquired his contract of purchase in good faith and for a valuable consideration in 1928. (17) In 1922 and at various other times thereafter, those interested as heirs of the Rosses made demands

on Mrs. Linfield and Linfield College for the property, which were refused by Linfield College, which claimed title. (18) Mrs. Linfield, and her successors in title, have been in possession and paid all taxes and assessments since October 4, 1916. (19) Subsequent persons interested in the title made improvements at a cost of $42,500, relying upon the title. (20) Mrs. Linfield and all parties to the transaction of October 4, 1916, died before the commencement of this action.

All of these facts are shown by the findings, and the District Judge in its conclusions and decree determined that there was no equity in petitioner's case, and that any right to question the deed of October 4, 1916, had been lost due to ratification, limitation statutes, the seven year tax statute, and laches.

Respectfully Submitted,

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